Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

76-854

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Petitioner,

vs.

ANN S. COUGLER,

Respondent.

Petition for a Writ of Certiorari to the California Supreme Court and the Court of Appeal of the State of California, Fourth Appellate District.

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Petitioner,

vs.

ANN S. COUGLER,

Respondent.

Petition for a Writ of Certiorari to the California Supreme Court and the Court of Appeal of the State of California, Fourth Appellate District.

Petitioner, Carpenters Pension Trust for Southern California, prays that a writ of certiorari issue to review the Judgment of the California Supreme Court entered on November 18, 1976, and from the Judgment of the Court of Appeal of the State of California, Fourth Appellate District, entered September 28, 1976.

Opinion Below.

This matter was determined by the Supreme Court of the State of California and by the Court of Appeal of the State of California without opinion. A copy of the Orders of denial of the Petition for Writ of Mandate are appended hereto.

Jurisdiction.

Jurisdiction of this Court is invoked, pursuant to 28 U.S.C. §1257(3) and is based on the ground that the California Supreme Court and the Court of Appeal of the State of California, the highest courts of the State, have determined against the validity of the Federal right, privilege and immunity granted to petitioner under Section 514 of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 897 (29 U.S.C. §1144).

Constitutional and Statutory Provisions Involved.

This case involves the provisions of Article VI, Clause 2, of the Constitution of the United States.

This case also involves 29 U.S.C. §1144, which forms a part of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. §1000, et seq.). Said section states:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

"*Construction and application*

"(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

"(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed

to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

"(B) Neither an employee benefit plan described in section 1003(a) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

"(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

"(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

"(c) For purposes of this section:

"(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

"(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regu-

late, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

"(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law."

Question Presented.

The question presented is whether the courts of the State of California may, contrary to the explicit preemption provisions of Section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1144) and the supremacy clause (Article VI, Clause 2, of the Constitution of the United States), regulate, by means of judicial decrees in marriage dissolution proceedings, employee pension benefit plans defined in said Act.

Statement of the Case.

Petitioner, Carpenters Pension Trust for Southern California (the Fund), is a duly constituted employee pension benefit plan within the meaning of Section 3(2) of the Employee Retirement Security Act of 1974 (ERISA) (29 U.S.C. §1002(2)).

Respondent, Ann S. Cougler, filed a Notice of Motion and Declaration re Joinder (Marriage) seeking to join petitioner as a party in the case entitled *In Re the Marriage of Cougler,* Superior Court of the State of California for the County of Orange, Case No. D

110487. In said Motion respondent seeks to allocate to herself a portion of the alleged pension benefits that may someday be due her former spouse, Thomas James Cougler, from petitioner. Said Motion was heard, together with opposition filed by petitioner herein, on July 27, 1976. By Order dated August 20, 1976, the Superior Court ordered petitioner joined in said lawsuit. Subsequently, respondent filed with the Superior Court a document entitled "Petition for Order Determining Interest in Pension Trust and Directing Disbursal Thereof" in which she requested that petitioner pay her directly a proportionate interest in any pension benefits payable to her former spouse.

At the hearing on the Motion for Joinder in the court below, petitioner herein raised the Constitutional issues sought to be reviewed by this Court at pages 11 through 20 of its opposition points and authorities filed therein. At that time, petitioner contended that the specific provisions of ERISA preempted any State action directed at petitioner requiring it to allocate benefits, issue separate benefit checks or in any way be liable to respondent, Ann S. Cougler.

Subsequent to the trial court decision, petitioner herein filed a timely Petition for Writ of Mandate or Other Appropriate Relief to the Supreme Court of the State of California, seeking an order compelling the Orange Conty Superior Court to vacate and reverse its order joining petitioner as a party. The Supreme Court of the State of California transferred the application to the Court of Appeal of the State of California,

Fourth Appellate District, Division Two, for further proceedings. Said Court, on September 28, 1976, issued its Order without opinion denying the Petition for Writ of Mandate. Thereafter, petitioner repetitioned the California Supreme Court for a hearing and on November 18, 1976, such Petition was denied, again without opinion. Copies of such Orders of denial are appended hereto.[1]

In both the California Court of Appeal and the California Supreme Court, petitioner contended, in its brief (pp. 9-17) that the joinder of petitioner and issuance of the Orders prayed for by respondent in the proceedings encroached upon an area preempted by the Employer Retirement Income Security Act of 1974 and in contravention of the United States Constitution, Article VI, Clause 2.

---

[1]Section 1085 of the California Code of Civil Procedure vests the power to issue writs of mandate in "any court." Thus, both the Supreme Court and the Court of Appeal have original jurisdiction with respect to writs of mandate. Because both courts have ruled on petitioner's request, certiorari is sought to both appellate courts.

REASONS FOR GRANTING THE WRIT.

A. The State Courts Have Decided a Substantial Federal Question Not Heretofore Determined by This Court That Adversely Impacts Upon a Field Specifically Preempted by a Federal Statute.

Petitioner herein is an employee pension benefit plan established as a result of a written collective bargaining agreement between the United Brotherhood of Carpenters and Joiners of America (A.F.L.-C.I.O.) and certain contractor associations. Petitioner administers monies received from employers pursuant to collective bargaining agreements, pools such contributions, invests the sums and distributes monthly pension benefits to retried plan participants. There are approximately 47,500 plan participants in this Fund, including 11,000 pensioners who receive a monthly pension check.

The California Supreme Court in the case of *Brown v. Brown,* 15 Cal. 3d 838 (1976), held that the inchoate interest of a spouse in a pension plan such as the Fund were subject to distribution by the California courts upon dissolution of a marriage. Shortly thereafter, an article appeared in the California State Bar Journal, Volume 51, page 206, entitled *Community Property Rights in Pensions* (a copy of the article is appended hereto), which recommended joinder of the pension fund itself in the dissolution proceedings and implied that the failure to do so might be tantamount to legal malpractice.

The article concludes:

> "In conclusion, before initiating dissolution proceedings involving, *interalia* [sic], community assets represented by retirement benefits, counsel *should always*:

"1. Determine the type of retirement system to which one of the parties belong (government, private or individual).

"2. Request of the retirement administrator a copy of the rules and regulations of the plan and the specific number of years the member has been in the plan, his accumulated contributions to date, his retirement benefits, the date of his retirement, cost of living benefits, etc.

"3. *Join the system to the within action* or provide for an integrated property agreement setting forth the specific terms of the judgment and a release of liability.

"By observing these recommended procedures, counsel will insure that the community property interests of the client in a pension plan are protected." (Emphasis added.)

Since the publication of the article, petitioner has been served with more than nine (9) Motions re Joinder in dissolution actions. Other employee pension benefit plans throughout the State of California have been similarly served and some filed declarations with the California Supreme Court to that effect. One plan filed an amicus curiae brief with that court.

Petitioner is advised that attempts to regulate employee pension benefit plans by means of judicial decree in marriage dissolution cases are occurring throughout the United States. Only an immediate decision by this Court will cease the unwarranted actions by spouses attempting to cause state courts to exercise control over an area expressly prohibited by Federal law.

B. The Joinder of the Carpenters Pension Trust for Southern California Encroaches Upon an Area Preempted by the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. §1000, et seq.).

The scope of the comprehensive Federal statute is clearly set forth in Section 514 of the Act (29 U.S.C. §1144), which reads, in pertinent part, as follows:

> "(a) Except as provided in subsection (b) of this section, the provisions of this subchapter *shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in Section 1003(a) of this title and not exempt under Section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> . . . .
>
> "(c) For purposes of this section:
>
> (1) The term 'State law' includes all laws, *decisions,* rules, regulations, *or other State action having the effect of law,* of any State. (2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.*" (Emphasis added.)

ERISA Section 1003 provides, in pertinent part, as follows:

> "(a) . . . this subchapter shall apply to any employee benefit plan if it is established or maintained

(1) by an employer engaged in commerce, or

(2) by an employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both."

From the foregoing, it was obviously Congress' intent to specify complete preemption; its mandate was that all pension plans be administered and all monies distributed exactly as ERISA dictates. By its very terms, Section 514 states that ERISA shall preempt not only State laws which may *conflict* with ERISA but also any State laws—including decisional law—which so much as *relate to* employee pension benefit plans, including the remedies requested by the wife below.

The United States Department of Labor, Division of Pension and Welfare Programs, is one of the Federal agencies responsible for the administration and enforcement of ERISA. That agency's position is as follows:

> "The effect of this section [514 (a)] is to preempt all state laws which *relate to* employee benefit plans subject to the coverage of Title 1 of ERISA (Protection of Employee Benefit Rights), *whether such state laws conflict with the terms of the federal legislation or would merely supplement the federal scheme.* The coverage of ERISA extends to employee benefit plans established or maintained by employers engaged in commerce or in any industry or activity affecting commerce, or by employee organizations representing employees so engaged. ERISA §4(a). The term 'employee benefit plan' encompasses both pension plans and welfare plans.

> "The major reasons for broad preemption disclosed in these remarks include (1) the need to prevent conflicting regulation over interstate plans, (2) the desire to avoid the litigation that would result from piecemeal preemption, (3) the emergence of a pervasive Federal interest in employee benefit plans, and (4) the existence of a comprehensive Federal program for future study (see §3022)." (Emphasis added) (Letter of James D. Hutchinson, Administrator, Pension and Welfare Benefit Programs, Department of Labor) to Willie R. Barnes, California Corporations Commissioner, dated July 14, 1976 (96 BNA Pension Reporter R-1).

The legislative history of ERISA amply supports this interpretation. The statements of the bill's sponsors during floor debate clarify and reiterate Congress' intent to preempt the entire field of employee pension benefit plan law. Senator Javits, in comparing the bill reported out by the Conference Committee of the earlier House and Senate versions, stated the purpose of ERISA's preemption provision:

> ". . . Both House and Senate bill provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans

not clearly connected to the Federal regulatory scheme.

"Although the desirability of further regulation —at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." (Emphasis added.) 120 Cong. Rec. S. 15751 (Aug. 22, 1974) (Remarks of Sen. Javits)

The Petition of the wife filed in the court below alleges and prays as follows:

"The joinder of Carpenters Pension Trust for Southern California as a party hereto is necessary to the enforcement of any judgment rendered by the within court awarding a portion of said Pension Fund to Petitioner herein, said award to be payable at a future date."

"That Carpenters [petitioner] pay to Ann S. Cougler said interest [monthly pension benefits] when, as and if said interest [of Thomas J. Cougler] becomes payable under the provisions of said Trust." (The full Petition is appended hereto.)

Thus, the Orders of the California courts issued and sustained below very clearly purport to regulate the manner and means by which the petitioner fulfills its fiduciary obligations to its plan participants,[2] a task explicitly left to the Secretary of Labor and the Secretary of Treasury.

There is no question that petitioner is an employee pension benefit plan under ERISA and that the application of California community property law in the manner requested by the wife as set forth above "relates to" the operation, administration and control of such plan. Thus, the courts below were precluded, as a matter of law, from regulating the petitioner in the manner requested by the wife. *Head v. New Mexico Board,* 374 U.S. 424 (1963); *Wissner v. Wissner,* 338 U.S. 655 (1950).

Moreover, California community property law is in actual direct conflict with the Federal scheme evidenced in Section 205 of the Act. As such, State community property law must yield for this reason as well. *Free v. Bland,* 369 U.S. 663, 666, 668 (1962). Section 205 of ERISA (29 U.S.C. §1055) dictates that all pension plans shall provide for a form of pension under which the participant and the spouse may receive joint and survivor annuity benefits for their respective lifetimes. This section reads, in pertinent part, as follows:

"(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits

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[2]The term "plan participant" is defined in ERISA Section 3(1) (29 U.S.C. §1002(7)).

in a form having the effect of a qualified joint and survivor annuity . . .

"(g) For purposes of this section: . . . (3) the term 'qualified joint survivor annuity' means an annuity for the life of the participant with a survivor annuity for the life of his spouse *which is not less than one-half of, or greater than, the amount of the annuity payable during the joint lives of the participant and his spouse and which is the actuarial equivalent of a single annuity for the life of the participant.*" (Emphasis added)

The Federal regulations under this section (temporary income tax regulations, 26 CFR Part 11, Section 11.401 (a)(11)) stipulate:

"A qualified joint and survivor annuity must be at least the actuarial equivalent of the normal form of annuity or any optional form of benefit offered under the plan . . . An annuity is not a qualified joint and survivor annuity if payments to the spouse of a deceased participant are terminated because of such spouse's remarriage."

Thus, in essence, ERISA dictates that all pension plans must provide a form of pension under which the spouse of a participant, after the participant's death (unless she elects otherwise), may continue to receive her share of the community property represented by the pension benefit from the pension plan. During the participant's lifetime, the annuities of both arrive together on one check; upon the participant's death, however, his surviving spouse continues to receive her share of the pension benefits—a share which, under the regulation quoted above, the spouse will continue to receive even though she may remarry.

By enacting such a provision, Congress has evidenced its intent to take into account the property right a participant's spouse has in his pension plan. It is, of course, true that ERISA does not expressly provide a scheme operative when a participant becomes divorced. One Act, such as ERISA, certainly cannot encompass all possible situations and, thus, Congress left this aspect to the Federal agencies. This subject will, undoubtedly, be covered in the Federal regulations that will ultimately be promulgated by the United States Department of Labor and the United States Department of the Treasury.

Clearly, the operation of California's community property laws, as requested by the wife herein, conflict with this Federal scheme. The interposition of such individual State schemes impermissibly injects diversity into what is meant to be a uniform set of rules in respect of pension benefit payments.

Conclusion.

The decision of the California courts joining petitioner constitutes clear state action that regulates directly and indirectly the terms and conditions of this employee pension benefit plan.

The Act itself is written in clear and unequivocal language. It specifically preempts any State regulation of employee pension benefit plans. Pension plans throughout the State of California and, indeed, throughout the United States, are being subjected to unwarranted attempts by state courts to interfere in the administration of the plans by the issuance of orders in marriage dissolution matters. So long as Congress has mandated non-interference with these plans,

they must be regulated internally by the cognizant Federal agencies and not by the state courts.

For the reasons set forth above, it is requested that the Petition for Writ of Certiorari be granted and that a writ issue to the Supreme Court of the State of California and/or the Court of Appeal of the State of California, Fourth Appellate District, compelling said courts to issue an order directing the Superior Court of the County of Orange to vacate its Order joining Petitioner herein.

Respectfully submitted,

CHARLES P. SCULLY,
GEORGE M. COX,
LAWRENCE TEPLIN,
Attorneys for Petitioner.

APPENDIX

APPENDIX.

Court of Appeal—State of California, Fourth Appellate District, Division Two.

Carpenters Pension Trust for Southern California, Petitioner vs. Superior Court, County of Orange, Respondent, Ann S. Cougler, Real Party in Interest. 4 Civil No. 17338, County No. D-110487, Sup. Ct. # LA 30668.

Filed: Sept. 28, 1976.

BY THE COURT:

The petition for writ of mandate is DENIED.

cc:

County Clerk, County of Orange, Courthouse, Santa Ana, Calif. 92701

Cox, Castle, Nicholson & Weekes, 2049 Century Park East, 28th Floor, Los Angeles, Calif. 90067

Elwin Greer, P. O. Box 315, Seal Beach, Calif. 90740

Edward M. Daly, 100 E. Ocean Blvd., Suite 906, Long Beach, Calif. 90802

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Robert W. Gilbert, 400 S. Beverly Drive, Suite 305, Beverly Hills, Calif. 90212

Tamura, J., *Acting P. J.*

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

Nov. 18, 1976.

I have this day filed Order Hearing Denied.

In re: 4 Civ. No. 17338 Carpenters' Pension Trust vs. Superior Court, Orange

Respectfully,

G. E. BISHEL
Clerk

Order Re Joinder (Marriage).

Superior Court of California, County of Orange.

In re the marriage of Ann S. Cougler, Petitioner and Thomas James Cougler, Respondent. Case Number D 110487.

Filed: Aug. 20, 1976.

IT IS ORDERED THAT Carpenters Pension Trust for Southern California be joined as a party to this proceeding, that the original of the submitted pleading be filed, and that, if appropriate, summons be issued thereon.

Dated 8/20/76

/s/ Robert H. Green
Judge of the Superior Court

Notice of Motion and Declaration Re Joinder (Marriage).

Superior Court of California, County of Orange.

In re the marriage of Ann S. Cougler, Petitioner and Thomas James Cougler, Respondent. Case Number D 110487.

NOTICE OF MOTION

To: Respondent, Thomas James Cougler and his attorney of record.

Notice is given that Petitioner, Ann S. Cougler, will apply to this court, located at 700 Civic Center Dr. West, Santa Ana, Calif., on 6-24-76 at 1:30 m., Department or Room No. 4, for the order requested in the DECLARATION below.

Dated June 7, 1976.

/s/ Elwin H. Greer
Attorney for Petitioner
ELWIN H. GREER

DECLARATION

Petitioner, Ann S. Cougler requests the court to order the joinder of Carpenters Pension Trust for Southern Calif. as a party to this proceeding and declares that a copy of the pleading required by Rule 1253 is attached and that:

1. (State facts showing that each person sought or seeking to be joined has in his possession or control or claims to own any property subject to disposition by the court or that such person has or claims custody

or physical control of any minor children of the marriage) Carpenters Pension Trust of Southern California has in its possession and control pension funds or rights thereto held by said Fund for the benefit and on behalf of Thomas James Cougler, Respondent herein.

2. (State facts showing that it would be appropriate for the court to determine the particular issue in the proceeding) Said Pension Fund or right thereto has accrued during the marriage of the parties herein and is a community property asset of the within marriage.

3. (State facts showing that each person sought or seeking to be joined is either indispensable to a determination of the particular issue or necessary to the enforcement of any judgment rendered on the issue) The joinder of Carpenters Pension Trust for Southern California as a party hereto is necessary to the enforcement of any judgment rendered by the within court awarding a portion of said Pension Fund to Petitioner herein, said award to be payable at a future date.

I declare under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration was executed on June 7, 1976 at Seal Beach, California.

/s/ Elwin H. Greer
ELWIN H. GREER

Petition for Order Determining Interest of Ann S. Cougler in Pension Trust and Directing Disbursal Thereof.

Superior Court of California, County of Orange.

In re the marriage of Ann S. Cougler, Petitioner, and Thomas James Cougler, Respondent. Case Number D 110487.

Filed: June 7, 1976.

Petitioner, ANN S. COUGLER, alleges:

1. That Respondent, Carpenters Pension Trust for Southern California (Carpenters) is a pension trust organized under and doing business in the State of California.

2. That Carpenters has possession and control of funds held in trust for the benefit of THOMAS JAMES COUGLER, Respondent herein.

3. That Petitioner, ANN S. COUGLER, is, and at all times herein mentioned was, the lawful wife of THOMAS JAMES COUGLER.

4. That the interest in said trust funds standing in the name of THOMAS J. COUGLER was accrued in whole or in part during the marriage of Petitioner, ANN S. COUGLER, to THOMAS J. COUGLER and is, in whole or in part, the community property of said parties.

5. That on or about March 24, 1976 Petitioner, ANN S. COUGLER, filed a Petition for Dissolution of Marriage in the within court, Case Number D 110487

wherein Petitioner requests the court to dispose of the community property of the marriage in accordance with the law of the State of California.

6. That subject to disposition of the within Court, ANN S. COUGLER is entitled to a proportionate interest in said pension fund as her sole and separate property.

WHEREFORE, Petitioner prays:

1. Determination of her interest in said pension fund;

2. That said interest as determined be declared her sole and separate property.

3. That Carpenters pay to ANN S. COUGLER said interest when, as and if said interest becomes payable under the provisions of said trust.

Dated: June 7, 1976

/s/ Elwin H. Greer
ELWIN H. GREER, Attorney for Petitioner

Community Property Rights in Pensions—

Some Legal and Procedural Considerations.

By Michael P. Calof

In recent years, more and more cases specifically dealing with the rights of a spouse to a portion of a pension in a dissolution of marriage proceeding have reached the appellate level of the California judicial system. This phenomenon is not so startling when one realizes that pension emoluments can represent considerable monetary benefits to the prevailing party. For the practicing attorney in the field of family law, it is quite important to understand the nature of a pension, the particular provisions which govern its administration and the rights of his client, if any, in the plan's benefits. If entitlement to any part of a pension by a spouse is once established, the procedural steps counsel must take to insure compliance by the plan administrator with the final decree of the court become an absolute necessity.

Entitlement to a pension is a contractual right arising by virtue of one's employment (See: 38 Cal. Jur. 2d 322). Within this contractual agreement between employer and employee will be found the terms and conditions which must be satisfied before a pension is ultimately received. The most important of those provisions will be the specified number of years of employment that must be completed before an employee has a right to receive a pension; the provisions of refundability of the employee's accumulated contributions and interest earned thereon; the dollar amount each member contributes per pay period from his gross salary; the methodology of calculating a member's final pension based on age and years of service; provisions

for cost of living increments once the member is pensioned and provisions for survivorship benefits to widows, children and dependents.

Prior to 1974, pension plans were almost as varied in their contractual provisions as the number of employers in the United States who, in fact, had a retirement plan. This tremendous variance existed because pension plans were either totally management-created or they were the resultant creature of a negotiated settlement between labor and management.

Uniformed Plans

With the passage of the Pension Reform Act of 1974 (ERISA), the federal government through its two administering agencies—the Internal Revenue Service and the Department of Labor—is now mandated to promulgate rules and regulations that will require uniformity of all private sector pension plans in their contractual pension obligations with their employees. For the time being, governmental and other special plans are exempt from the provisions of ERISA (Paragraph 354, Sec. 4(b) ERISA). Federal legislation notwithstanding, the law in California directly related to pensions is that they constitute a community property asset. As was stated in *Fithian v. Fithian* ((1974) 10 Cal. 3d 592):

> . . . The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested are community property subject to equal division between the spouses in the event the marriage is dissolved.

As stated in *Bensing v. Bensing,* ((1972) 25 Cal. App. 3d 889):

> Pension benefits are part of the consideration earned by the employee. They are not gratuities of the employer but, as a part of the salary earned by such employee, they are community property. (Also, see: *In Re Marriage of Wilson,* (1974) 10 Cal. 3d 851; *Waite v. Waite,* (1972) 6 Cal. 3d 461; *Phillipson v. Board of Administration,* (1970) 3 Cal. 3d 32; *In Re Marriage of Peterson,* (1938) 27 Cal. App. 2d 642; *Benson v. City of Los Angeles,* (1963) 60 Cal. 2d 355 and *French v. French,* (1941) 17 Cal. 2d 755.)

From this basic premise, the courts have set forth, for purposes of determining the vested pension interests of the parties, the further significant distinction between that which is the subject of division as community property and that which is not.

> Only the consideration earned by an employee during marriage is community property. Salary earned prior to marriage is separate property. (Civ. Code, §§5108, 5110). Pension rights which result from employment both before and after marriage derive from both separate and community property. Like any other asset which has its source in both separate and community property, the retirement pension fund must be apportioned upon division of the assets (*In Re Marriage of Wilson,* (1974) 10 Cal. 3d 854).

In *Waite v. Waite,* ((1972) 6 Cal. 3d 461) the court held that in dividing community assets represented by pension entitlements, one must consider

> . . . not only accumulated contributions the employee has made to a pension plan but also the entire matured pension rights payable as a benefit of employment.

It should be evident, therefore, that pension benefits of a spouse in a dissolution of marriage proceeding, under the Family Law Act (Civ. Code, §4350, et seq.), constitute a significant community property asset. If one still has any doubt, the recent holding in *Smith v. Lewis* ((1975) 13 Cal. 3d 349) should be required reading.

In the *Smith* case, the wife sued her attorney for malpractice and won a $100,000 judgment. She alleged that he failed to assert her community property interest in her husband's federal and state retirement benefits. Her attorney argued that well-informed lawyers at that time were reasonably divided in their opinions as to the nature of retirement benefits in a dissolution of marriage and, at the time of the dissolution proceeding, the law was uncertain as to retirement benefits. In affirming the trial court's decision the Supreme Court held, in part:

> No lawyer would suggest the property characterization of (respondent's) retirement benefits to be so esoteric an issue that defendant could not reasonably have been expected to be aware of it or its probable solution.
>
> In any event . . . had defendant conducted minimal research into either hornbook or case law, he would have discovered with modest effort that (respondent's) state retirement benefits were likely to be treated as community property and that his federal benefits at least arguably belonged to the community as well.

Once having established that a pension plan does exist for one or both of the parties to the action, counsel should obtain a copy of the rules and regulations governing that particular plan. In addition, counsel should determine by written communication to the plan administrator the length of service of the member, his accumulated contributions to date, whether or not the member's right to a pension has vested and if so, what benefits, if any, arise in the event of the member's death and what rights terminate upon the member's death.

Vesting of Pension Rights No Longer A Controlling Criteria In The Determination of Community Assets

In February of 1976, the Supreme Court of this state, in the case of *In re Marriage of Brown* (No. L.A. 30463), reversed a rule of law pertaining to spousal rights in a nonvested pension which had existed for some thirty-five years. This decision was not unexpected. The Court had indicated its intent to overturn the rule of *French v. French* ((1941) 17 Cal. 2d 755) in *In re Marriage of Wilson* ((1974) 10 Cal. 3d 851).

The rule recognized in *French* was to the effect that when a member of a pension plan did not have a vested right to a pension because he had not served the requisite number of years as provided in the rules and regulations of the retirement plan, then, in that event, there was but a mere expectancy of such a pension which by its very nature was not a divisible asset and constituted neither personal nor community property. The reasoning in *French* simply was that inasmuch as the member's right to a pension was

nonvested, his spouse's rights could be no greater than his and, therefore, her community property rights were also nonvested and could not be divided.

The *French* rule worked very harsh results (See: *In re Marriage of Peterson,* (1974) 41 Cal. App. 3d 642), but was continuously upheld (See: *In re Marriage of Martin* (1975) 50 Cal. App. 3d 581; *In re Marriage of Jones,* (1975) 13 Cal. 3d 592; *In re Marriage of Bensing,* (1972) 25 Cal. App. 3d 201 and *In re Marriage of Bruegl,* (1975) 47 Cal. App. 3d 150).

In the *Brown* case, the husband was an employee of the General Telephone Company. He and his spouse were married in July of 1950. Pursuant to the retirement plan, which was non-contributory in nature, the husband needed 78 points before being eligible for a pension. At the time of their separation in November of 1973, he had accumulated 72 points and would have had 78 points on November 30, 1976.

Pursuant to the rule in *French,* the trial court held that the husband did not have a vested right to a pension and, therefore, is value could not be divided as an item of community property upon dissolution. The effect of the *French* rule in the *Brown* case is stated by the Court as follows:

> Robert's pension rights, a valuable asset built up by 24 years of community effort, under the *French* rule would escape division by the court as a community asset solely because dissolution occurred two years before the vesting date. If, as is entirely likely, Robert continues to work for General Telephone Company for the additional two years needed to acquire a vested right, he

> will then enjoy as his separate property an annuity created predominantly through community effort. This "potentially whimsical result," as the Court of Appeal described a similar division of community property in *In re Marriage of Peterson,* supra, (1974) 41 Cal. App. 3d 642, 651, cannot be reconciled with the fundamental principle that property attributable to community earnings must be divided equally when the community is dissolved.

The Supreme Court, in *Brown,* held that the rule in *French* is cemented in error. The Court stated in part:

> As we shall explain, the *French* rule cannot stand because nonvested pension rights are not an expectancy but a contingent interest in property; furthermore, the *French* rule compels an inequitable division of rights acquired through community effort. Pension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding.
>
> We conclude that *French v. French* and subsequent cases erred in characterizing nonvested pension rights as expectancies and in denying the trial courts the authority to divide such rights as community property. This mischaracterization of pension rights has and, unless overturned, will continue to result in equitable division of community assets. Over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his

services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community. (See Thiede, op. cit., supra, U.S.F.L. Rev. 635). A division of community property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent that equal division of community property contemplated by Civil Code section 4800.

In adopting this very predictable ruling, the Supreme Court carefully denoted that alimony is not to be a substitute for the award of spouse's community property share of the other spouse's vested or nonvested pension because "Alimony, however, lies within the discretion of the trial court; the spouse should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right" (*In re Marriage of Peterson*, supra (1974) 41 Cal. App. 3d 642, 651).

Furthermore, in deciding the retroactive effect of its rule, the court held:

> We conclude that our decision today should not apply retroactively to permit a nonemployee spouse to assert an interest in nonvested pension rights when the property rights of the marriage have already been adjudicated by a decree of dissolution or separation which has become final as to such adjudication, unless the decree expressly reversed jurisdiction to divide such pension rights at a later date (see Civil Code, §4800). Our decision will apply retroactively, however, to any case in which the property rights arising from

> the marriage have not yet been adjudicated, to such rights if such adjudication is still subject to appellate review, or if in such adjudication the trial court has expressly reserved jurisdiction to divide pension rights.

The Supreme Court's decision in *In re Marriage of Brown*, supra, while righting a long overdue wrong, has raised several problems which subsequent decisions by the court will have to reconcile.

Assume an employee is a member of a retirement plan whose provisions require twenty years of service before a member is fully vested. Assume, furthermore, that the plan is non-contributory on the employee's part. During his fifth year of employment, the employee obtains a dissolution of marriage.

Pursuant to the holding in *Brown*, husband and wife each have a community property interest in husband's nonvested pension. Even though husband must work 15 more years till he is, in fact, eligible for a pension and even though wife has a community property right to a portion of that pension (i.e. one-half of five years of husband's pension), she must wait 15 more years to receive her interest.

The husband cannot be required, at this time, to pay any portion of such nonvested pension to the wife because though a property right exists, such right is still contingent in nature. The employer of a non-contributory plan cannot be required to pay any sums to either party because such order would constitute an impairment of the obligation of contract. Therefore, the wife would be entitled to receive a one-half interest in a nonvested pension but will have to wait 15 years for her own interest to "mature."

At that point in time, pursuant to *In re Marriage of Martin,* supra, husband must pay wife her proportionate share out of his own earnings if he chooses to stay on the job and not to retire.

Assume the same acts and the same type of pension plan. During the husband's 20 years of service, husband marries and lawfully divorces three different wives. Pursuant to *Brown,* each wife has a vested property right in a nonvested pension. The three former wives of husband each hold a property right in part of the pension. Would the plan, having first been joined in all of the dissolutionments, have to issue checks to three wives and the husband upon the latter's retirement?

The *Brown* decision also appears to overrule *In re Marriage of Olhausen,* ((1975) 8 Cal. App. 3d 190) although *Brown* does not even mention that case.

In *Olhausen,* a police officer who was retired as a result of an industrial disability was sued for divorce by his wife who sought, among other things, her community property interest in her husband's disability retirement.

The court reaffirmed their prior holding in *In re Marriage of Loehr* ((1975) 13 Cal. 3d 465) and *In re Marriage of Jones* ((1975) 13 Cal. 3d 457), supra, and again denoted the distinction that in characterizing the community interest of the parties in the retirement system, the court will look to the purpose of the payment (See: *Olhausen,* (1975) 48 Cal. App. 3d at page 193).

The court, in reviewing contracts of agreement between the employer and employee, then stated:

> "The "contribution" which employees make to the public employees' retirement fund is an involuntary burden imposed by law. Under the governing statute, future events determine what the employee and spouse will receive. The possibilities include a vested retirement for service, a right to withdraw contributions upon termination of employment, and a disability benefit. These alternatives are a part of the contract of employment. Under some circumstances there is a payout which may be divided between the spouses. Under the circumstances of this case, the law provides for a disability benefit payable to Alan, and nothing more. This benefit was earned by services performed during marriage (just as in the *Fithian* and *Jones* cases) but the benefit paid is not the kind which is to be divided upon dissolution of marriage.

It seems that *Olhausen* created a vehicle by which a system member could defeat the community property rights of a spouse if he "elected" and, in fact, received a disability pension.

However, while not specifically so stated, the Supreme Court in *Brown* appears to have overruled *Olhausen* by implication. If the property right of a non-member spouse, whether vested or nonvested, comprises a property interest of the community, then by implication it cannot be defeated [even by disability].

Child Support and Spousal Support

Another recurring question which is repeatedly asked of plan administrators and their counsel is to what extent pension emoluments are subject to creditor's rights.

In the leading case of *Ogle v. Heim* ((1968) 69 Cal. 2d 7) the Supreme Court, while reviewing §31452 and 21201 of the Government Code, was, in fact, construing §690.22 (now §690.18(a)-(c)) of the Code of Civil Procedure. The issue was whether or not the prohibition against garnishment, execution and attachment of any private retirement plan was applicable to alimony and child support payments now due and owing.

The court interpreted then §690.22 Code Civ. Proc. to include the prohibition against execution for child support. The court reasoned that "prohibition against assignment restricts both voluntary and involuntary alienation (See: *Ogle v. Heim, supra,* p. 13) and to permit an execution for child support would be to create an exception where none exists." In a companion case of *Miller v. Superior Court* ((1968) 69 Cal. 2d 14) pension payments were further exempted from liability for alimony.

The holding in *Ogle v. Heim* and *Miller v. Superior Court,* supra, was criticized in a minority opinion by the State Supreme Court. In *Phillipson v. Board of Administration* ((1970) 3 Cal. 3d 32) the defendant (husband) was an employee of the state from 1955 through April 1, 1966. As a state employee, he was a member of the Public Employees' Retirement System and, by virtue of such membership, had regular deductions taken from his salary and placed in his retirement

account. Plaintiff (wife) obtained an interlocutory decree of divorce on April 14, 1966 in which she was awarded in part "any state employee retirement system funds which have accrued to the credit of defendant by reason of his employment." Defendant (husband) did not contest the divorce or appeal from the judgment. Defendant had filed, on July 19, 1967, for a life pension in lieu of a return of his accumulated contributions.

The Supreme Court held that while the wife could not execute on the husband's accumulated contributions as a creditor because of the prohibition in §21020 of the Government Code (See: *Ogle v. Heim,* (1968) 69 Cal. 2d 7), she could assert her claim as "an owner of a present, equal and existing interest" (See: Gov. Code §5105). The majority in *Phillipson* relied on the holding in *Grossan v. Grossan* ((1939) 35 Cal. App. 2d 29).

The minority opinion in the *Phillipson* case rejected this conclusion and asserted that while Gov. Code §21201 specifically provided that pension funds were not subject to garnishment, execution, attachment or any other process whatsoever, permitting the wife to claim a one-half interest as an owner in a present, existing and equal interest in essence made her a judgment creditor.

However, effective January 1, 1976, §690.18 of the Code of Civil Procedure was amended so as to provide, in part, that all monies received by a California resident as a pension or as an annuity or retirement or disability or death or other benefit or a return of contribution or interest therein, are subject to execution for court-ordered child and spousal support. There-

fore, by legislative enactment, *Ogle v. Heim,* supra, and *Miller v. Superior Court,* are no longer the law in this state.

Predicated on the trend toward removing the sacrosanct manner in which pension rights were once held, the California Legislature has now made it possible for the non-member spouse to execute on any form of pension. It should be further noted that the amended version of §690. 18 Code Civ. Proc. now makes it possible to execute on a disability pension which, following *Olhausen,* supra, and prior to *Brown,* supra, was a questionable legislative enactment. However, in light of *In re Marriage of Brown,* supra, any special protection afforded to disability pensions would, it seems, no longer exist.

Some Procedural Considerations

Presuming that one or both of the parties is a member of a retirement plan, measures must be taken to bind the administrators of the system by the judgment of the Superior Court upon the dissolution of the marriage.

Two procedural avenues are available to accomplish this purpose. One avenue is by joining the retirement system as claimant to the proceeding pursuant to Rule 1253 and 1254 of the California Rules of Court.

Rule 1253 provides:

(a) An application for joinder shall be made by serving and filing a notice of motion that specifies a hearing date not more than 20 days from the date of filing such notice. The application shall state with particularity the claimant's interest in the proceedings and the relief sought by the applicant, and it shall be accompanied by an

appropriate pleading setting forth such claim as if it were asserted in a separate action or proceeding.

(b) Every application for joinder, response thereto, order for joinder, and summons issued thereon shall be in the form prescribed by Rules 1291.10, 1291.20, 1291.30, and 1291.40. [As amended effective January 1, 1972; adopted effective November 23, 1970.]

Rule 1254 provides:

(a) The court may order that a person be joined as a party to the proceeding if the court finds that it would be appropriate to determine the particular issue in the proceeding and that the person to be joined as a party is either indispensable to a determination of that issue or necessary to the enforcement of any judgment rendered on that issue. In determining whether it is appropriate to determine the particular issue in the proceeding, the court shall consider its effect upon the proceeding, including whether the determination of that issue will unduly delay the disposition of the proceeding, whether other parties would need to be joined to render an effective judgment between the parties, whether the determination of that issue will confuse other issues in the proceeding, and whether the joinder of a party to determine the particular issue will complicate, delay, or otherwise interfere with the effective disposition of the proceeding.

(b) If the court orders that a person be joined as a party to the proceeding pursuant to subdivision (a) of Rule 1252 the court shall direct that an appropriate summons be issued and that

the claimant be served with a copy of the application for joinder, the pleading attached thereto, the order of joinder, and the summons. The claimant has 30 days after service within which to file an appropriate response. [Adopted effective November 23, 1970.]

The other viable approach is to create an integrated agreement setting forth the contractual relationship between the parties and the retirement system and the division of the community interest therein, incorporating such agreement into the judgment. This integrated agreement should also provide a waiver by the parties and a release of all persons and administrative bodies associated with the payment of any fund pursuant to the provisions of the judgment.

Prior to drafting an integrated property settlement agreement, counsel should be cognizant of the general rule that rights granted pursuant to a retirement plan are not assignable except as specifically provided in the law (See: 38 Cal. Jur. 2d 9). In *San Jose v. Forsythe* ((1968) 261 Cal. App. 2d 114) the court held, in part:

> Restrictions on assignability of benefits under both public and private retirement programs are valid and prevent the transfer to third parties of any rights held by the beneficiary of the plan, and in view of California policy favoring a provision such as that contained in the San Jose Municipal Code (§2904.128), making the rights of any person to money in the city employees' retirement fund unassignable, the language therein employed should be liberally construed (Accord *Thomas v. Thomas,* (1961) 192 Cal. App. 2d 777; Witkin, *Summary of Calif. Law,* Vol. 1, page 612).

However, in cases where the community property interest in a pension has been judicially determined, the community property of the spouse and the pensioner may be assigned by the pensioner to such spouse as an incident to, resulting from, or subsequent to a dissolution of marriage proceeding. An agreement containing such an assignment must be included in the court order and be accompanied by an irrevocable waiver by the member or pensioner of amounts or right assigned together with the release from liability of the claimant.

In conclusion, before initiating dissolution proceedings involving, *interalia,* [sic] community assets represented by retirement benefits, counsel should always:

1. Determine the type of retirement system to which one of the parties belong (government, private or individual).

2. Request of the retirement administrator a copy of the rules and regulations of the plan and the specific number of years the member has been in the plan, his accumulated contributions to date, his retirement benefits, the date of his retirement, cost of living benefits, etc.

3. Join the system to the within action or provide for an integrated property agreement setting forth the specific terms of the judgment and a release of liability.

By observing these recommended procedures, counsel will insure that the community property interests of the client in a pension plan are protected.